IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16042 & 16044 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYDIP BABULAL CHAUHAN - Petitioner(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR YM THAKKAR for Petitioner(s) : 1,
MR LB DABHI AGP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 03/11/2006

ORAL JUDGMENT

1. Heard the learned Advocate, Mr.Yogesh Thakkar, appearing on behalf of petitioners and

learned AGP, Mr.Dabhi, appearing on behalf of respondent.

2. In both the matters, rule has been issued by this Court on 2.8.2006, made it returnable on 30.8.2006.

3. Brief facts of the present petition being SCA No.16042/2006 are that petitioner was appointed as Safai Kamdar by order dated 21.10.1993 passed by respondent with fixed pay of Rs.300/- per month for working three hours everyday. According to petitioner, he was working with diligence and honesty at Choki No.3, 4, 6 and 7 and as the person working at Choki No.1, 2, 5 and 8 passed away, the petitioner was entrusted with additional work by way of order of appointment for additional three hours and additional Rs.300/- per month paid to the petitioner by the respondent. On 16.5.2006, the service of petitioner has been terminated as a part time employee by respondent without giving any opportunity to the petitioner which order is

under challenge.

4. In SCA No.16044/2006, petitioner was appointed as Safai Kamdar by order dated 21.10.1993 passed by respondent with fixed pay of Rs.300/- per month for working three hours everyday. According to petitioner, she was working with diligence and honesty at LCB Police Line and has not given any cause of complaint to the respondent. However, her service was terminated by respondent suddenly without any justification and reason on 16.5.2006 which order is under challenge.

5. Learned Advocate, Mr.Thakkar, submitted that petitioners were continuously working with respondent more than 10 years, even though service of the petitioners was not regularized by respondent. He also submitted that looking to the Government Resolution dated 26.12.1980, the State Government has decided to consider the case of part time employees after a period of three years, to be regularized their services as a

full time employees. He also submitted that this Resolution dated 26.12.1980 has been kept in abeyance by another Resolution dated 21.8.1995. However, the case of the petitioners was not considered by the respondent after a period of three years as a full time employee. He also submitted that at the time of appointment some sort of procedure was followed by the respondent while giving appointment to the petitioners. He also submitted that the petitioners are qualified to the post of Safai Kamdar and also eligible for the post of Safai Kamdar according to Recruitment Rules. He submitted that at the time of making appointment, no procedure was followed by respondent, for that petitioners should not have to be penalized. He also submitted that it is a duty rather legal obligation on the part of the respondents to make appointment as per Service Rules / Recruitment Rules. Not to make appointment as per Service / Recruitment Rules, then, it is not a fault on the part of the petitioners but, it was a fault on the part of respondent. Meaning thereby that respondents

failed in discharging legal obligation. Therefore, he submitted that respondents should have to consider the case of the petitioners for regular employee in the post of Safai Kamdar as a full time employee. He also submitted that it is a settled principle of law that in case if any adverse civil consequence is required to be effected to any employee, at least principle of natural justice is required to be followed by respondents. The service of the petitioners has been terminated without following the principles of natural justice which hit by Articles 14 and 16 of the Constitution of India. He also submitted that it is not the case of the respondent that termination is result of non-working or no work. He submitted that perennial work is available with the respondent during last more than 10 years but, no work was given to the petitioners. Meaning thereby that work is available with the respondent, even though service has been abruptly terminated by respondent. He also submitted that respondent is now taking some work through agency, therefore,

requirement of work is there but, persons will be appointed through agency. Therefore, ultimately, respondent – State Government may not have any burden either financial or administrative to continue such employee for a long period. He submitted that it amounts to State Government applying the business brain with colourful device to terminate the service of such employees, those who have continued for more than 10 years with the respondents. He also submitted that if work is available and work is permanent in nature, then to terminate the service of such employee which amounts to unfair labour practice by the state authority, who has acted as a private employer. He relied upon the decision of Apex Court (i) Mineral Exploration Corporation Employees' Union v. Mineral Exploration Corpn. Ltd. and another, (2006) 6 SCC 310 and also of this Court (Coram : D.H.Waghela,J.) in SCA No.4355 of 2006 and group of matters dated 18.9.2006

6. Relying upon the aforesaid decision, he

submitted that in case of Mineral Exploration Corporation Employees' Union (supra), the decision of larger Bench in case of Umadevi has been considered and it has been held by Apex Court that if an employee is temporary employee or daily rated, those who were remained in service more than 10 years, their services should have to regularized by the Corporation because work is available, fund is also available with the Corporation and Corporation required many employees to be employed for carrying out the work.

7. In view of the aforesaid submissions made by learned Advocate, Mr.Thakkar, he submitted that petitioners will make detailed representation in light of the aforesaid decisions of Apex Court as well as this Court, to the State Government and some suitable direction may be issued to the respondents, so that they may consider the case of petitioners for regularizing the service of petitioners. He also submitted that the claim of the petitioners is only for regularizing the

service and not to make permanent which required to follow the procedure under the Recruitment Rules. He also pointed out that there is difference between permanency and regularization of the services of such employees. He submitted that regularization has been interpreted by Apex Court that employee concerned is entitled to 'equal pay for equal work' salary and no permanency which requires the set up with the respondent Government. Therefore, he submitted that respondent Government may be directed to consider the case of the petitioners in light of the decision of the Apex Court as well this Court.

8. Learned advocate Mr.Thakkar, has placed reliance in case of ***Mineral Exploration Corpn. Employees' Union v. Mineral Exploration Corpn. Ltd. And Another*** reported in ***(2006) 6 SCC 310***. Relevant Para 16, 17, 25, 36 and Para 38 of the said decision are quoted as under:

> *“16. At the time of hearing, our attention was drawn to the judgment delivered*

by the Constitution Bench of this Court in Secy.., State of Karnataka v. Umadevi (3). The said case deals with public employment, absorption, regularisation, or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees appointed/recruited and continued for long in public employment dehors the constitutional scheme of public employment. Our attention was specifically drawn to para 53 of the said judgment authored by Hon'ble P.K. Balasubramanyan, J. for the Bench, which reads thus : (SCC p. 42)

> *"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanapps, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred and and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure (emphasis supplied), the services of such irregularly (emphasis in original) appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be*

> *filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."*

17. It is seen from the above paragraph that this Court directed the Union of India, the State Governments and their instrumentalities to regularise as a one-time measure, the services of such irregularly appointed workmen, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed.

25. He also relied on para 12 of the judgment of the Constitution Bench which reads as under : [Umadevi(3) case, SCC p. 22]

> *"12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed*

permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme."

36. Usual practice of the Corporation has been to keep contingent workmen for long duration of time and offering regular appointment periodically which abruptly had stopped due to unfair attitude of the management. Reduction in work leading to poor physical and financial performance has been a result of incompetent and poor management which cannot be allowed to play with the future of thousands of employees and their families.

38. It shall be proper to regularise the services of the workmen who have worked for several years. However, the workmen in order to succeed will have to substantiate their

claim as per the established principles of law. We feel it just and proper to issue the following directions to the Tribunal which is directed to consider the following directions and pass appropriate orders after affording opportunities to both the parties.

1. The Tribunal is directed to again scrutinise all the records already placed by the appellant Union and also the records placed by the management and discuss and deliberate with all the parties and ultimately arrive at a conclusion in regard to the genuineness and authenticity of each and every claimant for regularisation. This exercise shall be done within nine months from the date of receipt of this judgment.

2. Subject to the outcome of the fresh enquiry of the award, the respondent Corporation should absorb them permanently and regularise their services, the persons to be so appointed being limited to the quantum of work which may become available to them on a perennial basis.

3. The respondent Corporation may absorb on permanent basis only such of those workmen who have not completed the age of superannuation.

4. The respondent Corporation is not required to absorb on permanent basis such of the workmen who are found medically unfit for such employment.

5. The absorption of the eligible workmen on a regular and permanent basis by the Corporation does not disable the Corporation from utilising their services for any other manual work for the Corporation upon its needs.

6. In the matter of absorption, the persons who have worked for longer period

as contingent/ad hoc/ temporary workmen shall be preferred to those who have to be in shorter period of work.

7. The workman should have worked for more than 240 days in a year. The conduct and behaviour of the workman should be good."

8. He also relied upon the recent decision given by the learned Single Judge (Coram : Justice D.H. Waghela) on 18th September 2006 in respect of the same issue in group of Special Civil Applications No. 4355 of 2006 and Others. The relevant Para 17.1 is quoted as under :

"17.1 However, the cases of the petitioners who have been in service for more than ten years against duly sanctioned vacant posts are on a different footing and they are required to be considered on different basis in light of the observations made in paragraph 53 of the judgment of the Secretary, State of Karnataka v. Umadevi (supra). There is already for them the direction of the Supreme Court that the State Governments and their instrumentalities should take steps to regularize, as a one-time measure, the services of such irregularly appointed employees who have worked for ten years or more in duly sanctioned posts, but not under the cover of orders of Courts or Tribunals. Since many of the petitioners employed for more than ten years and for six hours or more per day are stated to have worked against sanctioned posts, the respondents are required to consider such cases on the basis of the facts and circumstances of each case. It may be pertinent to add and observe that the State

Government, while prescribing the minimum rates of wages in scheduled employment under the Minimum Wages Act, 1948, usually provide for payment of full wages in case the hours of work exceed five hours per day. Therefore, ideally, a part-time employee working for six or more hours per day since more than ten years should be considered as a full-time employee for the benefit of regularization, if he is otherwise eligible and covered by the exceptional clause and directions contained in paragraph 53, as mentioned hereinabove. Age-bar cannot, in the nature of things, be invoked in consideration of such cases and for effectuating the mandate. Since the averments in particular petitions of the petitioner actually working full time, though treated and branded as a part-timer, are neither substantiated nor specifically traversed, the respondents have to be left to consider such cases in light of actual facts and the above direction of the Hon'ble Apex Court.“

8. In view of these submissions and considering the observations made by the Apex Court as well as this Court, as referred above, it is open for the petitioners to make detailed representation to the respondent within a period of one month from the date of receiving the copy of this order. As and when respondent receives the representation from the petitioners, it is directed to the respondent to consider the representation of the petitioners and examine the grievance in light of the decision of the Apex

Court as well as this Court and pass appropriate reasoned order in accordance with law keeping in mind that work is available with the respondent and same work has been taken by respondent from another agency and decide it within a period of two months from the date of receiving the copy of this order. In the case if the representation of the petitioners is rejected by the respondent, it will be open for the petitioners to challenge the same before appropriate forum in accordance with law.

9. In view of the aforesaid observations and directions, present petitions are disposed of, without expressing any opinion on merits. Rule is made absolute accordingly. Direct service is permitted.

(H.K.Rathod,J.)

(vipul)